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No. 85-1639

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES GREER,

Petitioner,

vs.

DAVID A. GRAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the seventh circuit's ruling below that attorney ignorance or inadvertence alone constitutes cause for a state procedural default renders ineffectual the cause prong of *Wainwright v. Sykes* and is in direct conflict with this Court's decision in *Engle v. Isaac*?

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JAMES GREER,

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Respondent.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Gray v. Greer*, 778 F.2d 350 (7th Cir. 1985). A copy of the opinion is attached to this petition as Appendix A. The opinion of Magistrate Gerald B. Cohn of the United States District Court for the Southern District of Illinois is attached to this petition as Appendix B. A prior opinion filed by the seventh circuit in this case is reported at *Gray v. Greer*, 707 F.2d 965 (7th Cir. 1983).

JURISDICTION

On November 27, 1985, the seventh circuit reversed the decision of Magistrate Gerald B. Cohn of the United States District Court for the Southern District of Illinois dismissing the Petition for a Writ of Habeas Corpus on its merits. Petitioner's timely filed Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on January 3, 1986 (Appendix C), and the seventh circuit's mandate was stayed pending review by this Court on January 24, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1982).

STATEMENT OF THE CASE

Respondent David Gray was convicted of rape, armed robbery and attempted murder in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, and sentenced to sixty years imprisonment. (R. 3) On appeal to the Appellate Court of Illinois, Fifth Judicial District, the Office of the Illinois State Appellate Defender raised four issues on respondent's behalf: (1) whether his guilt was established beyond doubt; (2) whether the testimony of his former cellmate was admissible at trial; (3) whether prosecutorial remarks misled the jury on the reasonable doubt standard; and (4) whether respondent was properly sentenced to an extended term. (R. 7, Exhibit 1) The appellate court affirmed [*People v. Gray*, 80 Ill. App. 3d 213, 399 N.E.2d 206 (5th Dist. 1979)], and respondent's Peti-

tion for Leave to Appeal to the Illinois Supreme Court was denied. (R. 3)

Respondent filed a federal habeas corpus petition alleging insufficiency of the evidence and prosecutorial misconduct during closing argument. After the petition was dismissed on its merits (R. 7, Exhibit 3), respondent filed a state post-conviction petition raising the claims of improper exclusion of blacks from his jury and prosecutorial misconduct. The court ruled that respondent had waived the jury selection claim by not raising it on direct appeal and that the issue of prosecutorial misconduct was *res judicata*. (R. 7, Exhibit 4) Denial of the petition was affirmed by the appellate court. (R. 7, Exhibit 5).

Respondent brought a second federal habeas petition, alleging ineffective assistance of appellate counsel on direct appeal and improper jury selection procedures. The parties agreed to proceed before a magistrate pursuant to 28 U.S.C. §636(c). The magistrate dismissed the petition, finding that respondent had not exhausted his ineffective assistance of counsel claim pursuant to Ill. Rev. Stat. 1979, ch. 38, §122-1 *et seq.* (R. 16) This decision was reversed by the seventh circuit, which determined that the claim would not be entertained by the Illinois courts inasmuch as it was not raised in respondent's initial post-conviction petition. *Gray v. Greer*, 707 F.2d 965 (7th Cir. 1983).

On remand, the magistrate ruled that respondent had waived the claim of improper jury selection by not raising it on direct appeal and that his appellate counsel's conduct could not constitute cause for the state procedural default as contemplated by *Wainwright v. Sykes*, 433 U.S. 72 (1976), because his performance passed muster under the sixth amendment. Accordingly, both claims raised by the petition were dismissed. (R. 61-68)

On appeal to the seventh circuit, the court agreed that respondent's claims had been waived under Illinois law but found erroneous the magistrate's conclusion that where counsel's inept performance is advanced to satisfy the cause prong of *Wainwright*, counsel need be so ineffective as to violate the sixth amendment. Rather, respondent need only show that his procedural default resulted from counsel's ignorance or inadvertence. *Gray v. Greer*, 770 F.2d 350, 353, 354 (7th Cir. 1985). The court further held that the magistrate's evaluation of appellate counsel's efficacy could not be properly made absent a review of the trial record. *Id.* at 353. Accordingly, the court ordered the case remanded for a redetermination of whether respondent's right to counsel was violated and whether, even if it were not, respondent could establish cause and prejudice resulting from his failure to raise the jury selection issue on direct appeal. *Id.* at 354.

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which was denied January 3, 1986. The seventh circuit's mandate has been stayed pending review by this Court.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S RULING BELOW THAT ATTORNEY IGNORANCE OR INADVERTENCE ALONE CONSTITUTES CAUSE FOR A STATE PROCEDURAL DEFAULT RENDERS INEFFECTUAL THE CAUSE PRONG OF *WAINWRIGHT v. SYKES* AND IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *ENGLE v. ISAAC*.

Without citation to any authority, the United States Court of Appeals for the Seventh Circuit held below that mere attorney ignorance or inadvertence in committing a state procedural default constitutes cause as contemplated by *Wainwright v. Sykes*, 443 U.S. 72 (1977). This ruling is in direct conflict with *Engle v. Isaac*, 456 U.S. 107 (1982), and severely erodes the interests in finality, comity and federalism giving rise to the *Wainwright* decision.

As cause for his state forfeiture, the habeas petitioner in *Engle* argued that he could not have known at the time of his trial that the Due Process Clause addresses the burden of proving affirmative defenses. While suggesting that the novelty of a constitutional claim might under some circumstances constitute cause, this Court held that it was not presently established because the tools necessary to construct the due process claim were available to counsel at the time of procedural default. In explanation, this Court stated:

> We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. *Counsel*

> *may have overlooked* or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the constitution guarantees criminal defendants only a fair trial and a competent attorney. *It does not insure that defense counsel will recognize* and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, *the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.*

456 U.S. at 133, 134 (emphasis supplied).

It is manifest that if counsel's unawareness of an objection which could have been made only by the exercise of diligence does not establish cause, neither will counsel's ignorance or inadvertence alone suffice. Moreover, if the seventh circuit's ruling is allowed to remain intact, Illinois defendants will be assured federal review of their claims in virtually every case where properly invoked state procedural rules are not overtly flaunted. As recognized by this Court in *Engle* (456 U.S. at 1573, n. 36), the decision to withhold a known constitutional claim is reminiscent of a deliberate by-pass of state court remedies condemned in *Fay v. Noia*, 372 U.S. 391 (1963); limiting deference to reasonable state procedural requirements to tactical defaults guts the cause prong of *Wainwright* and seriously undercuts all evolving notions of state-federal comity in the habeas context.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. Alternatively, because the precise question for review raised in the petition is presently before this Court in *Sielaff v. Carrier*, No. 84-1554, petitioner requests that this Court hold the petition in abeyance pending its decision in that case.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-2779

DAVID A. GRAY,

Petitioner-Appellant,

v.

JAMES GREER,

Respondent-Appellee.

Appeal from the United States District Court for
the Southern District of Illinois, East St. Louis Division.
No. 81 C 3318—Gerald B. Cohn, *Magistrate.*

ARGUED JUNE 12, 1985—DECIDED NOVEMBER 27, 1985

Before BAUER and FLAUM, *Circuit Judges*, and GRANT, *Senior District Judge.**

FLAUM, *Circuit Judge.* In 1978, petitioner David Gray was convicted of rape, attempted murder and armed robbery and sentenced to sixty years in prison. Petitioner appeals from the dismissal of his habeas corpus petition. For the reasons stated below, we reverse the magistrate's order of dismissal and remand to the district court for proceedings consistent with this opinion.

David Gray was first tried for the rape of Ann Brewer on March 28, 1978. His defense was mistaken identity. The government's case was weakened by the inability of

* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

one eyewitness to identify Gray and the lack of corroborating physical evidence to support the in-court identification of Gray by the complaining witness. The trial resulted in a hung jury. The state retried Gray, presenting an additional witness, a former cellmate of Gray's who testified that he had heard Gray admit to the crimes. This time, the jury convicted Gray. The Illinois State Appellate Defender's office represented Gray on appeal of his conviction. The appellate brief raised the following issues: 1) insufficiency of the evidence; 2) improper use of the testimony of Gray's former cellmate; 3) misleading remarks by the prosecutor regarding reasonable doubt; and 4) improper sentencing. The Illinois Appellate Court upheld Gray's conviction and the Illinois Supreme Court denied leave to appeal.

Gray filed a habeas corpus petition in federal court alleging insufficiency of the evidence, prosecutorial misconduct and improper jury selection procedures. This petition was dismissed for failure to exhaust state remedies pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, § 122-1, *et seq.* Gray then filed a state post-conviction petition which was dismissed; the dismissal was affirmed on appeal.

Gray then brought his second federal petition for habeas corpus relief. The petition alleged ineffective assistance of appellate counsel and improper jury selection procedures. The parties agreed to proceed before a magistrate pursuant to 28 U.S.C. § 636(c). The magistrate dismissed Gray's petition, finding that he had not exhausted state remedies with respect to the ineffective assistance of counsel claim. Gray appealed from the dismissal and we reversed, finding that Gray's failure to raise an ineffective assistance of counsel claim in his initial state petition would prevent the Illinois courts from reviewing this claim. Hence, at the time petitioner filed his second habeas corpus petition in federal court, he had no available state remedies. We reversed and remanded for consideration of Gray's petition on the merits.

On remand, the magistrate reviewed Gray's brief on direct appeal and concluded that appellate counsel was not ineffective but rather "did a good job in citing applicable case law. . . . The four issues raised are wide-ranging and forcefully argued." The magistrate then found that "Gray's legal representation by the appellate public defender was, in fact, well above the average in the profession." The magistrate dismissed Gray's claim of improper jury selection procedures, finding that absent constitutionally defective counsel, petitioner could not show cause for the failure to raise this issue on direct appeal. This appeal followed.

I.

Petitioner contends that the district court erred in dismissing his claim of ineffective assistance of counsel without reviewing the record or conducting an evidentiary hearing. In dismissing petitioner's claim of ineffective assistance of appellate counsel, the magistrate did not review the trial court record. Instead, the magistrate relied solely on his examination of the appellate brief, and, finding the brief to be "a thorough discussion of the four issues raised", determined that appellate counsel was not ineffective. The basis for the district court's failure to examine the record was a reluctance to "second guess" appellate counsel regarding the choice of appropriate issues for appeal.

The right to appellate counsel is now firmly established. *Evitts v. Lucey*, 105 S.Ct. 830 (1985). *Strickland v. Washington*, 104 S.Ct. 2052 (1984) established the standard for ineffective assistance of counsel, and though it is phrased in terms of ineffective assistance of trial counsel, it can be used as a basis for establishing a standard for effective assistance of appellate counsel. *Accord Bowen v. Foltz*, 763 F.2d 191, 195 (6th Cir. 1985) (Coutie, J. dissenting); *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir. 1985); *Mitchell v. Scully*, 746 F.2d 951, 954 (2d Cir. 1984). Under *Strickland*, ineffective assistance of counsel

will be found when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* at 2064. The *Strickland* standard envisions a two-prong analysis. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *Id.* Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance. If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial. Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless. When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

The district court supported its decision by analogy to cases in which we have declined to "second guess" trial counsel's strategic decisions. These cases, however, are inapposite. They involved decisions of counsel which were arguably appropriate at the time, but, with the benefit of "hindsight", appeared less than brilliant. *United States v. Harris*, 558 F.2d 366, 371 (1977). A reviewing court can evaluate appellate counsel's choice of issues on appeal by examining the trial record and the appellate brief. While it is true that decisions which were arguably correct at the time will not be "second-guessed", a reviewing court must initially determine whether such decisions were, in fact, strategic.

Respondent may well be correct in its assertion that appellate counsel strategically chose not to raise certain

issues on appeal.[1] We hold only that the determination of whether the decision was strategic requires an examination of the trial record. In conducting such an examination, the district court should be guided by defendant's careful presentation of those issues which allegedly should have been raised on appeal, with accompanying citations to the trial record.

Respondent contends that we should affirm the district court's dismissal of the habeas petition because, in any event, petitioner waived his claim to effective assistance of counsel by failing to present it in his first post-conviction proceeding. It is true that petitioner's failure to raise the issue earlier constitutes a procedural default. *Wainwright v. Sykes*, 443 U.S. 72 (1977). Such a default precludes our review of a constitutional issue only if the petitioner cannot show cause for the default and prejudice resulting from the default. *Id.* The record is not sufficiently developed to warrant our making such a determination absent consideration by the district court.

In holding that a reviewing court must review the trial record, we emphasize that the right to effective assistance of appellate counsel does not require an attorney to advance every conceivable argument on appeal which the trial record supports. *Evitts v. Lucey*, 105 S.Ct. 830 (1985); *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). We require only that appellate counsel's choice of issues for appeal did not fall below "an objective standard of reasonableness," *Strickland v. Washington*, 104 S.Ct. 2052, 2065 (1984).

We therefore remand to the district court with instructions to review the trial court record and determine whether the issues which petitioner claims appellate coun-

[1] Respondent also contends that the district court's previous examination of the record in connection with claims in petitioner's first habeas petition makes unnecessary any examination of the record specifically in connection with his ineffective assistance of counsel claim. We find this contention to be without merit.

sel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial, and were so obvious from the trial record that the failure to present such issues amounted to ineffective assistance of appellate counsel.

Petitioner further seeks an evidentiary hearing to resolve his claim of ineffective assistance of counsel. An evidentiary hearing is required only if a review of the record is not sufficient to resolve factual disputes regarding the choice of issues. *Williams v. Owens*, 731 F.2d 391 (7th Cir. 1983). Given the nature of petitioner's claims, it is difficult to envision the evidence or testimony which petitioner would present at such a hearing. When a claim of ineffective assistance of counsel is based on failure to raise issues on appeal, we note it is the exceptional case that could not be resolved on an examination of the record alone. We leave the determination of whether an evidentiary hearing is required to the discretion of the district court after review of the trial court record.

II

After finding that appellate counsel was not constitutionally defective, the magistrate dismissed petitioner's claims regarding improper jury selection and impanelling, finding that since counsel was not constitutionally defective, Gray could not show "cause" for having failed to raise the claim on direct appeal.[2]

Under *Wainwright*, failure to raise an issue on direct appeal precludes review in a subsequent habeas corpus

[2] Because we remand for a redetermination of whether petitioner was deprived of his right to effective assistance of appellate counsel, we must also remand for a redetermination of whether petitioner had shown cause for failing to raise the jury selection issues on direct appeal. Since, however, the magistrate used an improper analysis to determine whether cause had been shown, we include a discussion of the standard which petitioner must satisfy under *Wainwright v. Sykes*, 433 U.S. 72 (1977).

proceeding unless the petitioner can show "cause" for failing to raise the issue and actual "prejudice" resulting from such failure. When a claim of ineffective assistance of counsel is advanced only to satisfy the cause requirement of *Wainwright*, however, counsel need not have been so ineffective as to violate the constitution. *Clay v. Director, Juvenile Div., Dept. of Corr.*, 749 F.2d 427, 433 n.4 (7th Cir. 1984). To show cause for failure to raise an issue on direct appeal, petitioner need only show that such failure resulted from the ignorance or inadvertence of appellate counsel. Therefore, we further remand for a redetermination of whether petitioner could show cause and prejudice for his failure to raise his jury selection claims on direct appeal.

It is further ordered that Circuit Rule 18 shall apply.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Filed September 14, 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAVID A. GRAY,

Petitioner,

Civil No. 81-3313 v.

JAMES GREER,

Respondent.

ORDER

This case is now before the Court on remand from the United States Court of Appeals for the Seventh Circuit.

Mr. Gray, the petitioner, is an inmate at the Menard Correctional Center in Menard, Illinois. On January 19, 1982, he filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254, seeking to overturn 1978 convictions in Madison County, Illinois, for rape, attempted murder and armed robbery. The respondent filed a Motion to Dismiss on January 26, 1982.

In our earlier Order of October 29, 1982, we noted that in Ground One of the habeas corpus Petition, Mr. Gray asserts that he was denied effective assistance of appellate counsel. We noted that Mr. Gray had not presented this claim to the state court by way of a post-conviction petition. We dismissed the petition for this reason, finding that Mr. Gray had not exhausted an available state court remedy.

On May 25, 1983, the Court of Appeals reversed, holding that the Illinois post-conviction statute, Ill. Rev. Stat. ch. 38, §122-1, *et seq.*, does not provide petitioner a meaningful remedy, and that, therefore, the plaintiff had in fact exhausted all viable state court remedies. The Court of Appeals noted that the petitioner had previously raised a different claim in a post-conviction petition, and that he is therefore precluded, according to applicable Illinois law, from now raising an issue which he could have raised in his earlier petition.

Thus, the Court of Appeals in *Gray v. Greer*, No. 82-2883 (decided May 25, 1983, *per curiam*) "express[ed] no opinion as to the merits of Gray's claims but only hold that he has exhausted his claims as required for federal habeas review." The case was "reversed and remanded for consideration on the merits."

Accordingly, the case is now before this District Court for a determination on the merits. We have before us Mr. Gray's petition, a motion to dismiss filed by respondent and additional motions and briefs. The respondent has also submitted verified copies of the decision of the Appellate Court of Illinois, and the appellate brief of Mr. Gray's appointed public defender—the appellate brief which Mr. Gray alleges to be constitutionally inadequate. Having carefully reviewed the entire file, it is the Order of this Court that, for the reasons stated below, the respondent's motion to dismiss must be granted and that Mr. Gray's petition be denied.

* * * * *

It seems worthwhile to first review the procedural history of this case. David Gray was convicted of attempted murder, rape and armed robbery and was sentenced to sixty years in prison. Petitioner appealed his conviction to the Illinois Appellate Court contending that: (1) his guilt was not established beyond a reasonable doubt; (2) statements of petitioner's cellmate improperly were introduced into evidence; (3) the prosecutor improperly and incorrectly explained the concept of reasonable doubt to the jury;

and (4) the trial court improperly sentenced petitioner to an extended sentence. The appellate court affirmed the conviction and the Illinois Supreme Court denied leave to appeal.

Petitioner then filed a petition for a writ of habeas corpus in federal district court raising four issues. One issue raised concerned the composition and selection of the jury. Petitioner claimed that blacks were precluded from participation in the jury. The district court found this jury claim had not been exhausted.

Petitioner returned to the Illinois courts and filed a petition for post-conviction relief raising three issues: (1) the prosecutor unlawfully used his peremptory challenges to exclude blacks from the jury; (2) the prosecutor influenced jurors with racial allegations; and (3) the prosecutor improperly used perjured testimony. Petitioner was represented by appointed counsel on his petition for post-conviction relief. The petition for post-conviction relief was denied because petitioner had waived the issue of discriminatory use of peremptory challenges by failing to raise it on direct appeal, and the issue of perjured testimony was res judicata because the petitioner raised the issue on direct appeal and the appellate court rejected it. The court did not rule on petitioner's second claim of improper prosecutorial remarks.

Petitioner appealed the denial of his post-conviction petition. Due to the fact that petitioner wished to raise the issue of incompetence of his original appellate counsel in his appeal of the denial of his post-conviction motion, his post-conviction counsel requested leave to withdraw. Post-conviction counsel was from the same agency as the appellate counsel; therefore, a conflict of interest was presented when petitioner challenged the competency of his original appellate counsel. The court appointed another attorney to represent petitioner on his post-conviction appeal. The newly appointed counsel did not raise the issue of ineffective assistance of appellate counsel in the appellate brief. The denial of petitioner's post-conviction motion was affirmed on appeal.

Prior to the Illinois Appellate Court's denial of petitioner's appeal, petitioner filed the present habeas petition in federal district court. Petitioner raises three issues in the present habeas petition: (1) ineffective assistance of counsel on the direct appeal of his conviction; (2) the constitutionality of the jury selection and impanelling process that resulted in the exclusion of blacks from the jury; and (3) denial of his right to appeal from the rejection of his post-conviction motion. Pursuant to the consent of the parties, the case was transferred to the undersigned United States Magistrate.

For the reasons stated above, this Court then denied Gray's habeas corpus petition. This denial was reversed by the Court of Appeals, and the petition is now before us again for consideration on the merits.

We first consider Mr. Gray's claim of ineffective assistance of counsel on the direct appeal from his conviction.

We have before us the appellate brief submitted on Mr. Gray's behalf by the Office of the State Appellate Defender, John H. Reid (Deputy Defender) and Randy E. Blue (Assistant Defender). This brief was filed in the Appellate Court of Illinois, Fifth Judicial District on August 22, 1979. It raises four issues, as noted above, arguing that (1) plaintiff's guilt was not established beyond a reasonable doubt; (2) statements of petitioner's cellmate improperly were introduce into evidence; (3) the prosecutor improperly and incorrectly explained the concept of reasonable doubt to the jury; and (4) the trial court improperly sentenced petitioner to an extended sentence.

The brief is an extensive one, thirty-three (33) pages long, and is a thorough discussion of the four issues raised. The preliminary statement of the facts in the brief is carefully stated, and appellate counsel consistently and methodically refers to these facts when he presents his four arguments. Counsel does a good job in citing applicable case law, based on our review of that case law. The four issues raised are wide-ranging and forcefully argued. Although I agree with the subsequent decision of the Appel-

late Court of Illinois denying Mr. Gray's appeal, I find that Mr. Gray's legal representation by the appellate public defender was, in fact, well above the average in the profession.

The Sixth Amendment, through the due process clause of the Fourteenth Amendment, guarantees petitioner legal assistance that met "a minimum standard of professional representation." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975). Furthermore, there is a presumption in favor of adequate representation.

> In considering a claim of ineffective assistance of counsel we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties. The burden of demonstrating the contrary is on his former clients. *United States v. Trapnell*, 638 F.2d 1016, 1027 (7th Cir. 1980), quoting *Matthews v. United States*, 518 F.2d 1245, 1246 (7th Cir. 1975); *United States v. Fleming*, 594 F.2d 598, 606-07 (7th Cir. 1979).

It has been held that a reviewing federal habeas court will not second guess a petitioner's trial counsel on questions of trial tactics. *See, United States v. Harris*, 558 F.2d 366 (7th Cir. 1977) (cross examination strategy); *United States v. Chausee*, 536 F.2d 637 (7th Cir. 1976) (failure to assert insanity defense); *Harris v. Clusen*, 487 F. Supp. 616 (S.D. Wis. 1980) (tactical decision not to rely on insanity defense). Similarly, this reviewing habeas court will not second-guess Gray's appellate public defender on his selection of issues on appeal, particularly where the issues appealed were carefully briefed and forcefully argued.

The second issue which Mr. Gray argues in the instant habeas corpus petition concerns the constitutionality of the jury selection and impanelling process. Regarding this issue, the Seventh Circuit Court of Appeals made the following comments with this remand:

> Petitioner is attempting to attack the composition of the jury which convicted him, and the method by which it was impanelled. Petitioner did not raise this

> issue on direct appeal. The record does not indicate whether the issue was raised at trial. If the issue was not raised at trial by a contemporaneous objection, the petitioner may have waived the issue. *Engle v. Isaac*, 102 S.Ct. 1558 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1976). In addition, petitioner's failure to raise the issue of the jury composition on direct appeal may also preclude federal habeas review. *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983) (en banc). However, ineffective appellate counsel may provide the requisite showing of cause which is required to circumvent the waiver provision of *Spurlark*, *Wainwright* and *Engle*. A determination that Gray has waived these claims, however, is a determination on the merits, which we leave for the district court on remand. 82-2883, at p. 8, footnote 5.

I find that Mr. Gray's failure to raise this issue on direct appeal precludes federal habeas corpus review. *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983) (en banc). As we noted above, Mr. Gray has failed to establish the ineffectiveness of his appellate counsel. He has failed to establish the type of "cause" which is required to circumvent the waiver provision of *Spurlark*.

The third, and final, issue which Mr. Gray raises in the instant habeas corpus petition concerns his alleged denial of the right to appeal from the rejection of his earlier state court post-conviction motion. This issue is moot, however, as the Court of Appeals noted in this remand. (82-2883, page 3, at footnote 1).

Thus, it is the determination of this Court, after careful consideration, that the instant petition for a writ of habeas corpus must be denied on the merits, in its entirety.

We note parenthetically, however, that this petition could also be dismissed as "repetitive," pursuant to Rule 9(b) of the Supreme Court's Rules Governing Section 2254 Cases in the United States District Courts. In an Order filed on December 11, 1980, United States District Judge William L. Beatty of this Court denied an earlier habeas

corpus petition filed by Mr. Gray. We find no reason why the issues raised in the instant petition could not have been raised in the earlier petition.

In any event, as noted above, the instant petition is without substantive merit.

Therefore, for all of the reasons stated above, IT IS THE ORDER of this Court that respondent's Motion to Dismiss is GRANTED and that Mr. Gray's Petition for a writ of habeas corpus is DENIED.

/s/ Gerald B. Cohn
United States Magistrate

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 3, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

DAVID A. GRAY,

Petitioner-Appellant,

No. 83-2779 vs.

JAMES GREER,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.
No. 81 C 3318—**Gerald B. Cohn**, *Magistrate.*

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Respondent-Appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

85-1639

No.

Supreme Court, U.S.
FILED
APR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES GREER,

Petitioner,

vs.

DAVID A. GRAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Printed by Authority of the State of Illinois (P.O. 33185—55—4-3-86)

QUESTION PRESENTED FOR REVIEW

Whether the seventh circuit's ruling below that attorney ignorance or inadvertence alone constitutes cause for a state procedural default renders ineffectual the cause prong of *Wainwright v. Sykes* and is in direct conflict with this Court's decision in *Engle v. Isaac*?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Gray v. Greer*, 778 F.2d 350 (7th Cir. 1985). A copy of the opinion is attached to this petition as Appendix A. The opinion of Magistrate Gerald B. Cohn of the United States District Court for the Southern District of Illinois is attached to this petition as Appendix B. A prior opinion filed by the seventh circuit in this case is reported at *Gray v. Greer*, 707 F.2d 965 (7th Cir. 1983).

JURISDICTION

On November 27, 1985, the seventh circuit reversed the decision of Magistrate Gerald B. Cohn of the United States District Court for the Southern District of Illinois dismissing the Petition for a Writ of Habeas Corpus on its merits. Petitioner's timely filed Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on January 3, 1986 (Appendix C), and the seventh circuit's mandate was stayed pending review by this Court on January 24, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1982).

STATEMENT OF THE CASE

Respondent David Gray was convicted of rape, armed robbery and attempted murder in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, and sentenced to sixty years imprisonment. (R. 3) On appeal to the Appellate Court of Illinois, Fifth Judicial District, the Office of the Illinois State Appellate Defender raised four issues on respondent's behalf: (1) whether his guilt was established beyond doubt; (2) whether the testimony of his former cellmate was admissible at trial; (3) whether prosecutorial remarks misled the jury on the reasonable doubt standard; and (4) whether respondent was properly sentenced to an extended term. (R. 7, Exhibit 1) The appellate court affirmed [*People v. Gray*, 80 Ill. App. 3d 213, 399 N.E.2d 206 (5th Dist. 1979)], and respondent's Peti-

tion for Leave to Appeal to the Illinois Supreme Court was denied. (R. 3)

Respondent filed a federal habeas corpus petition alleging insufficiency of the evidence and prosecutorial misconduct during closing argument. After the petition was dismissed on its merits (R. 7, Exhibit 3), respondent filed a state post-conviction petition raising the claims of improper exclusion of blacks from his jury and prosecutorial misconduct. The court ruled that respondent had waived the jury selection claim by not raising it on direct appeal and that the issue of prosecutorial misconduct was *res judicata*. (R. 7, Exhibit 4) Denial of the petition was affirmed by the appellate court. (R. 7, Exhibit 5).

Respondent brought a second federal habeas petition, alleging ineffective assistance of appellate counsel on direct appeal and improper jury selection procedures. The parties agreed to proceed before a magistrate pursuant to 28 U.S.C. §636(c). The magistrate dismissed the petition, finding that respondent had not exhausted his ineffective assistance of counsel claim pursuant to Ill. Rev. Stat. 1979, ch. 38, §122-1 *et seq.* (R. 16) This decision was reversed by the seventh circuit, which determined that the claim would not be entertained by the Illinois courts inasmuch as it was not raised in respondent's initial post-conviction petition. *Gray v. Greer*, 707 F.2d 965 (7th Cir. 1983).

On remand, the magistrate ruled that respondent had waived the claim of improper jury selection by not raising it on direct appeal and that his appellate counsel's conduct could not constitute cause for the state procedural default as contemplated by *Wainwright v. Sykes*, 433 U.S. 72 (1976), because his performance passed muster under the sixth amendment. Accordingly, both claims raised by the petition were dismissed. (R. 61-68)

On appeal to the seventh circuit, the court agreed that respondent's claims had been waived under Illinois law but found erroneous the magistrate's conclusion that where counsel's inept performance is advanced to satisfy the cause prong of *Wainwright*, counsel need be so ineffective as to violate the sixth amendment. Rather, respondent need only show that his procedural default resulted from counsel's ignorance or inadvertence. *Gray v. Greer*, 778 F.2d 350, 353, 354 (7th Cir. 1985). The court further held that the magistrate's evaluation of appellate counsel's efficacy could not be properly made absent a review of the trial record. *Id.* at 353. Accordingly, the court ordered the case remanded for a redetermination of whether respondent's right to counsel was violated and whether, even if it were not, respondent could establish cause and prejudice resulting from his failure to raise the jury selection issue on direct appeal. *Id.* at 354.

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which was denied January 3, 1986. The seventh circuit's mandate has been stayed pending review by this Court.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S RULING BELOW THAT ATTORNEY IGNORANCE OR INADVERTENCE ALONE CONSTITUTES CAUSE FOR A STATE PROCEDURAL DEFAULT RENDERS INEFFECTUAL THE CAUSE PRONG OF *WAINWRIGHT v. SYKES* AND IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *ENGLE v. ISAAC*.

Without citation to any authority, the United States Court of Appeals for the Seventh Circuit held below that mere attorney ignorance or inadvertence in committing a state procedural default constitutes cause as contemplated by *Wainwright v. Sykes*, 443 U.S. 72 (1977). This ruling is in direct conflict with *Engle v. Isaac*, 456 U.S. 107 (1982), and severely erodes the interests in finality, comity and federalism giving rise to the *Wainwright* decision.

As cause for his state forfeiture, the habeas petitioner in *Engle* argued that he could not have known at the time of his trial that the Due Process Clause addresses the burden of proving affirmative defenses. While suggesting that the novelty of a constitutional claim might under some circumstances constitute cause, this Court held that it was not presently established because the tools necessary to construct the due process claim were available to counsel at the time of procedural default. In explanation, this Court stated:

> We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. *Counsel*

> *may have overlooked* or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the constitution guarantees criminal defendants only a fair trial and a competent attorney. *It does not insure that defense counsel will recognize* and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, *the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.*

456 U.S. at 133, 134 (emphasis supplied).

It is manifest that if counsel's unawareness of an objection which could have been made only by the exercise of diligence does not establish cause, neither will counsel's ignorance or inadvertence alone suffice. Moreover, if the seventh circuit's ruling is allowed to remain intact, Illinois defendants will be assured federal review of their claims in virtually every case where properly invoked state procedural rules are not overtly flaunted. As recognized by this Court in *Engle* (456 U.S. at 1573, n. 36), the decision to withhold a known constitutional claim is reminiscent of a deliberate by-pass of state court remedies condemned in *Fay v. Noia*, 372 U.S. 391 (1963); limiting deference to reasonable state procedural requirements to tactical defaults guts the cause prong of *Wainwright* and seriously undercuts all evolving notions of state-federal comity in the habeas context.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. Alternatively, because the precise question for review raised in the petition is presently before this Court in *Sielaff v. Carrier*, No. 84-1554, petitioner requests that this Court hold the petition in abeyance pending its decision in that case.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-2779

DAVID A. GRAY,

Petitioner-Appellant,

v.

JAMES GREER,

Respondent-Appellee.

Appeal from the United States District Court for
the Southern District of Illinois, East St. Louis Division.
No. 81 C 3318—**Gerald B. Cohn,** *Magistrate.*

ARGUED JUNE 12, 1985—DECIDED NOVEMBER 27, 1985

Before BAUER and FLAUM, *Circuit Judges,* and GRANT, *Senior District Judge.**

FLAUM, *Circuit Judge.* In 1978, petitioner David Gray was convicted of rape, attempted murder and armed robbery and sentenced to sixty years in prison. Petitioner appeals from the dismissal of his habeas corpus petition. For the reasons stated below, we reverse the magistrate's order of dismissal and remand to the district court for proceedings consistent with this opinion.

David Gray was first tried for the rape of Ann Brewer on March 28, 1978. His defense was mistaken identity. The government's case was weakened by the inability of

* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

one eyewitness to identify Gray and the lack of corroborating physical evidence to support the in-court identification of Gray by the complaining witness. The trial resulted in a hung jury. The state retried Gray, presenting an additional witness, a former cellmate of Gray's who testified that he had heard Gray admit to the crimes. This time, the jury convicted Gray. The Illinois State Appellate Defender's office represented Gray on appeal of his conviction. The appellate brief raised the following issues: 1) insufficiency of the evidence; 2) improper use of the testimony of Gray's former cellmate; 3) misleading remarks by the prosecutor regarding reasonable doubt; and 4) improper sentencing. The Illinois Appellate Court upheld Gray's conviction and the Illinois Supreme Court denied leave to appeal.

Gray filed a habeas corpus petition in federal court alleging insufficiency of the evidence, prosecutorial misconduct and improper jury selection procedures. This petition was dismissed for failure to exhaust state remedies pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, § 122-1, *et seq.* Gray then filed a state post-conviction petition which was dismissed; the dismissal was affirmed on appeal.

Gray then brought his second federal petition for habeas corpus relief. The petition alleged ineffective assistance of appellate counsel and improper jury selection procedures. The parties agreed to proceed before a magistrate pursuant to 28 U.S.C. § 636(c). The magistrate dismissed Gray's petition, finding that he had not exhausted state remedies with respect to the ineffective assistance of counsel claim. Gray appealed from the dismissal and we reversed, finding that Gray's failure to raise an ineffective assistance of counsel claim in his initial state petition would prevent the Illinois courts from reviewing this claim. Hence, at the time petitioner filed his second habeas corpus petition in federal court, he had no available state remedies. We reversed and remanded for consideration of Gray's petition on the merits.

On remand, the magistrate reviewed Gray's brief on direct appeal and concluded that appellate counsel was not ineffective but rather "did a good job in citing applicable case law. . . . The four issues raised are wide-ranging and forcefully argued." The magistrate then found that "Gray's legal representation by the appellate public defender was, in fact, well above the average in the profession." The magistrate dismissed Gray's claim of improper jury selection procedures, finding that absent constitutionally defective counsel, petitioner could not show cause for the failure to raise this issue on direct appeal. This appeal followed.

I.

Petitioner contends that the district court erred in dismissing his claim of ineffective assistance of counsel without reviewing the record or conducting an evidentiary hearing. In dismissing petitioner's claim of ineffective assistance of appellate counsel, the magistrate did not review the trial court record. Instead, the magistrate relied solely on his examination of the appellate brief, and, finding the brief to be "a thorough discussion of the four issues raised", determined that appellate counsel was not ineffective. The basis for the district court's failure to examine the record was a reluctance to "second guess" appellate counsel regarding the choice of appropriate issues for appeal.

The right to appellate counsel is now firmly established. *Evitts v. Lucey*, 105 S.Ct. 830 (1985). *Strickland v. Washington*, 104 S.Ct. 2052 (1984) established the standard for ineffective assistance of counsel, and though it is phrased in terms of ineffective assistance of trial counsel, it can be used as a basis for establishing a standard for effective assistance of appellate counsel. *Accord Bowen v. Foltz*, 763 F.2d 191, 195 (6th Cir. 1985) (Coutie, J. dissenting); *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir. 1985); *Mitchell v. Scully*, 746 F.2d 951, 954 (2d Cir. 1984). Under *Strickland*, ineffective assistance of counsel

will be found when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* at 2064. The *Strickland* standard envisions a two-prong analysis. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *Id.* Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance. If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial. Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless. When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

The district court supported its decision by analogy to cases in which we have declined to "second guess" trial counsel's strategic decisions. These cases, however, are inapposite. They involved decisions of counsel which were arguably appropriate at the time, but, with the benefit of "hindsight", appeared less than brilliant. *United States v. Harris*, 558 F.2d 366, 371 (1977). A reviewing court can evaluate appellate counsel's choice of issues on appeal by examining the trial record and the appellate brief. While it is true that decisions which were arguably correct at the time will not be "second-guessed", a reviewing court must initially determine whether such decisions were, in fact, strategic.

Respondent may well be correct in its assertion that appellate counsel strategically chose not to raise certain

issues on appeal.[1] We hold only that the determination of whether the decision was strategic requires an examination of the trial record. In conducting such an examination, the district court should be guided by defendant's careful presentation of those issues which allegedly should have been raised on appeal, with accompanying citations to the trial record.

Respondent contends that we should affirm the district court's dismissal of the habeas petition because, in any event, petitioner waived his claim to effective assistance of counsel by failing to present it in his first post-conviction proceeding. It is true that petitioner's failure to raise the issue earlier constitutes a procedural default. *Wainwright v. Sykes*, 443 U.S. 72 (1977). Such a default precludes our review of a constitutional issue only if the petitioner cannot show cause for the default and prejudice resulting from the default. *Id.* The record is not sufficiently developed to warrant our making such a determination absent consideration by the district court.

In holding that a reviewing court must review the trial record, we emphasize that the right to effective assistance of appellate counsel does not require an attorney to advance every conceivable argument on appeal which the trial record supports. *Evitts v. Lucey*, 105 S.Ct. 830 (1985); *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). We require only that appellate counsel's choice of issues for appeal did not fall below "an objective standard of reasonableness," *Strickland v. Washington*, 104 S.Ct. 2052, 2065 (1984).

We therefore remand to the district court with instructions to review the trial court record and determine whether the issues which petitioner claims appellate coun-

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[1] Respondent also contends that the district court's previous examination of the record in connection with claims in petitioner's first habeas petition makes unnecessary any examination of the record specifically in connection with his ineffective assistance of counsel claim. We find this contention to be without merit.

sel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial, and were so obvious from the trial record that the failure to present such issues amounted to ineffective assistance of appellate counsel.

Petitioner further seeks an evidentiary hearing to resolve his claim of ineffective assistance of counsel. An evidentiary hearing is required only if a review of the record is not sufficient to resolve factual disputes regarding the choice of issues. *Williams v. Owens*, 731 F.2d 391 (7th Cir. 1983). Given the nature of petitioner's claims, it is difficult to envision the evidence or testimony which petitioner would present at such a hearing. When a claim of ineffective assistance of counsel is based on failure to raise issues on appeal, we note it is the exceptional case that could not be resolved on an examination of the record alone. We leave the determination of whether an evidentiary hearing is required to the discretion of the district court after review of the trial court record.

II

After finding that appellate counsel was not constitutionally defective, the magistrate dismissed petitioner's claims regarding improper jury selection and impanelling, finding that since counsel was not constitutionally defective, Gray could not show "cause" for having failed to raise the claim on direct appeal.[2]

Under *Wainwright*, failure to raise an issue on direct appeal precludes review in a subsequent habeas corpus

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[2] Because we remand for a redetermination of whether petitioner was deprived of his right to effective assistance of appellate counsel, we must also remand for a redetermination of whether petitioner had shown cause for failing to raise the jury selection issues on direct appeal. Since, however, the magistrate used an improper analysis to determine whether cause had been shown, we include a discussion of the standard which petitioner must satisfy under *Wainwright v. Sykes*, 433 U.S. 72 (1977).

proceeding unless the petitioner can show "cause" for failing to raise the issue and actual "prejudice" resulting from such failure. When a claim of ineffective assistance of counsel is advanced only to satisfy the cause requirement of *Wainwright*, however, counsel need not have been so ineffective as to violate the constitution. *Clay v. Director, Juvenile Div., Dept. of Corr.*, 749 F.2d 427, 433 n.4 (7th Cir. 1984). To show cause for failure to raise an issue on direct appeal, petitioner need only show that such failure resulted from the ignorance or inadvertence of appellate counsel. Therefore, we further remand for a redetermination of whether petitioner could show cause and prejudice for his failure to raise his jury selection claims on direct appeal.

It is further ordered that Circuit Rule 18 shall apply.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Filed September 14, 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAVID A. GRAY,

Petitioner,

Civil No. 81-3313 v.

JAMES GREER,

Respondent.

ORDER

This case is now before the Court on remand from the United States Court of Appeals for the Seventh Circuit.

Mr. Gray, the petitioner, is an inmate at the Menard Correctional Center in Menard, Illinois. On January 19, 1982, he filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254, seeking to overturn 1978 convictions in Madison County, Illinois, for rape, attempted murder and armed robbery. The respondent filed a Motion to Dismiss on January 26, 1982.

In our earlier Order of October 29, 1982, we noted that in Ground One of the habeas corpus Petition, Mr. Gray asserts that he was denied effective assistance of appellate counsel. We noted that Mr. Gray had not presented this claim to the state court by way of a post-conviction petition. We dismissed the petition for this reason, finding that Mr. Gray had not exhausted an available state court remedy.

On May 25, 1983, the Court of Appeals reversed, holding that the Illinois post-conviction statute, Ill. Rev. Stat. ch. 38, §122-1, *et seq.*, does not provide petitioner a meaningful remedy, and that, therefore, the plaintiff had in fact exhausted all viable state court remedies. The Court of Appeals noted that the petitioner had previously raised a different claim in a post-conviction petition, and that he is therefore precluded, according to applicable Illinois law, from now raising an issue which he could have raised in his earlier petition.

Thus, the Court of Appeals in *Gray v. Greer*, No. 82-2883 (decided May 25, 1983, *per curiam*) "express[ed] no opinion as to the merits of Gray's claims but only hold that he has exhausted his claims as required for federal habeas review." The case was "reversed and remanded for consideration on the merits."

Accordingly, the case is now before this District Court for a determination on the merits. We have before us Mr. Gray's petition, a motion to dismiss filed by respondent and additional motions and briefs. The respondent has also submitted verified copies of the decision of the Appellate Court of Illinois, and the appellate brief of Mr. Gray's appointed public defender—the appellate brief which Mr. Gray alleges to be constitutionally inadequate. Having carefully reviewed the entire file, it is the Order of this Court that, for the reasons stated below, the respondent's motion to dismiss must be granted and that Mr. Gray's petition be denied.

* * * * *

It seems worthwhile to first review the procedural history of this case. David Gray was convicted of attempted murder, rape and armed robbery and was sentenced to sixty years in prison. Petitioner appealed his conviction to the Illinois Appellate Court contending that: (1) his guilt was not established beyond a reasonable doubt; (2) statements of petitioner's cellmate improperly were introduced into evidence; (3) the prosecutor improperly and incorrectly explained the concept of reasonable doubt to the jury;

and (4) the trial court improperly sentenced petitioner to an extended sentence. The appellate court affirmed the conviction and the Illinois Supreme Court denied leave to appeal.

Petitioner then filed a petition for a writ of habeas corpus in federal district court raising four issues. One issue raised concerned the composition and selection of the jury. Petitioner claimed that blacks were precluded from participation in the jury. The district court found this jury claim had not been exhausted.

Petitioner returned to the Illinois courts and filed a petition for post-conviction relief raising three issues: (1) the prosecutor unlawfully used his peremptory challenges to exclude blacks from the jury; (2) the prosecutor influenced jurors with racial allegations; and (3) the prosecutor improperly used perjured testimony. Petitioner was represented by appointed counsel on his petition for post-conviction relief. The petition for post-conviction relief was denied because petitioner had waived the issue of discriminatory use of peremptory challenges by failing to raise it on direct appeal, and the issue of perjured testimony was res judicata because the petitioner raised the issue on direct appeal and the appellate court rejected it. The court did not rule on petitioner's second claim of improper prosecutorial remarks.

Petitioner appealed the denial of his post-conviction petition. Due to the fact that petitioner wished to raise the issue of incompetence of his original appellate counsel in his appeal of the denial of his post-conviction motion, his post-conviction counsel requested leave to withdraw. Post-conviction counsel was from the same agency as the appellate counsel; therefore, a conflict of interest was presented when petitioner challenged the competency of his original appellate counsel. The court appointed another attorney to represent petitioner on his post-conviction appeal. The newly appointed counsel did not raise the issue of ineffective assistance of appellate counsel in the appellate brief. The denial of petitioner's post-conviction motion was affirmed on appeal.

Prior to the Illinois Appellate Court's denial of petitioner's appeal, petitioner filed the present habeas petition in federal district court. Petitioner raises three issues in the present habeas petition: (1) ineffective assistance of counsel on the direct appeal of his conviction; (2) the constitutionality of the jury selection and impanelling process that resulted in the exclusion of blacks from the jury; and (3) denial of his right to appeal from the rejection of his post-conviction motion. Pursuant to the consent of the parties, the case was transferred to the undersigned United States Magistrate.

For the reasons stated above, this Court then denied Gray's habeas corpus petition. This denial was reversed by the Court of Appeals, and the petition is now before us again for consideration on the merits.

We first consider Mr. Gray's claim of ineffective assistance of counsel on the direct appeal from his conviction.

We have before us the appellate brief submitted on Mr. Gray's behalf by the Office of the State Appellate Defender, John H. Reid (Deputy Defender) and Randy E. Blue (Assistant Defender). This brief was filed in the Appellate Court of Illinois, Fifth Judicial District on August 22, 1979. It raises four issues, as noted above, arguing that (1) plaintiff's guilt was not established beyond a reasonable doubt; (2) statements of petitioner's cellmate improperly were introduce into evidence; (3) the prosecutor improperly and incorrectly explained the concept of reasonable doubt to the jury; and (4) the trial court improperly sentenced petitioner to an extended sentence.

The brief is an extensive one, thirty-three (33) pages long, and is a thorough discussion of the four issues raised. The preliminary statement of the facts in the brief is carefully stated, and appellate counsel consistently and methodically refers to these facts when he presents his four arguments. Counsel does a good job in citing applicable case law, based on our review of that case law. The four issues raised are wide-ranging and forcefully argued. Although I agree with the subsequent decision of the Appel-

late Court of Illinois denying Mr. Gray's appeal, I find that Mr. Gray's legal representation by the appellate public defender was, in fact, well above the average in the profession.

The Sixth Amendment, through the due process clause of the Fourteenth Amendment, guarantees petitioner legal assistance that met "a minimum standard of professional representation." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975). Furthermore, there is a presumption in favor of adequate representation.

> In considering a claim of ineffective assistance of counsel we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties. The burden of demonstrating the contrary is on his former clients. *United States v. Trapnell*, 638 F.2d 1016, 1027 (7th Cir. 1980), quoting *Matthews v. United States*, 518 F.2d 1245, 1246 (7th Cir. 1975); *United States v. Fleming*, 594 F.2d 598, 606-07 (7th Cir. 1979).

It has been held that a reviewing federal habeas court will not second guess a petitioner's trial counsel on questions of trial tactics. *See, United States v. Harris*, 558 F.2d 366 (7th Cir. 1977) (cross examination strategy); *United States v. Chausee*, 536 F.2d 637 (7th Cir. 1976) (failure to assert insanity defense); *Harris v. Clusen*, 487 F. Supp. 616 (S.D. Wis. 1980) (tactical decision not to rely on insanity defense). Similarly, this reviewing habeas court will not second-guess Gray's appellate public defender on his selection of issues on appeal, particularly where the issues appealed were carefully briefed and forcefully argued.

The second issue which Mr. Gray argues in the instant habeas corpus petition concerns the constitutionality of the jury selection and impanelling process. Regarding this issue, the Seventh Circuit Court of Appeals made the following comments with this remand:

> Petitioner is attempting to attack the composition of the jury which convicted him, and the method by which it was impanelled. Petitioner did not raise this

> issue on direct appeal. The record does not indicate whether the issue was raised at trial. If the issue was not raised at trial by a contemporaneous objection, the petitioner may have waived the issue. *Engle v. Isaac*, 102 S.Ct. 1558 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1976). In addition, petitioner's failure to raise the issue of the jury composition on direct appeal may also preclude federal habeas review. *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983) (en banc). However, ineffective appellate counsel may provide the requisite showing of cause which is required to circumvent the waiver provision of *Spurlark*, *Wainwright* and *Engle*. A determination that Gray has waived these claims, however, is a determination on the merits, which we leave for the district court on remand. 82-2883, at p. 8, footnote 5.

I find that Mr. Gray's failure to raise this issue on direct appeal precludes federal habeas corpus review. *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983) (en banc). As we noted above, Mr. Gray has failed to establish the ineffectiveness of his appellate counsel. He has failed to establish the type of "cause" which is required to circumvent the waiver provision of *Spurlark*.

The third, and final, issue which Mr. Gray raises in the instant habeas corpus petition concerns his alleged denial of the right to appeal from the rejection of his earlier state court post-conviction motion. This issue is moot, however, as the Court of Appeals noted in this remand. (82-2883, page 3, at footnote 1).

Thus, it is the determination of this Court, after careful consideration, that the instant petition for a writ of habeas corpus must be denied on the merits, in its entirety.

We note parenthetically, however, that this petition could also be dismissed as "repetitive," pursuant to Rule 9(b) of the Supreme Court's Rules Governing Section 2254 Cases in the United States District Courts. In an Order filed on December 11, 1980, United States District Judge William L. Beatty of this Court denied an earlier habeas

corpus petition filed by Mr. Gray. We find no reason why the issues raised in the instant petition could not have been raised in the earlier petition.

In any event, as noted above, the instant petition is without substantive merit.

Therefore, for all of the reasons stated above, IT IS THE ORDER of this Court that respondent's Motion to Dismiss is GRANTED and that Mr. Gray's Petition for a writ of habeas corpus is DENIED.

/s/ Gerald B. Cohn
United States Magistrate

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 3, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

DAVID A. GRAY,

Petitioner-Appellant,

No. 83-2779 vs.

JAMES GREER,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.
No. 81 C 3318—**Gerald B. Cohn,** *Magistrate.*

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Respondent-Appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.